SUPREME COURT, U.S.

No: 49

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IN THE

Supreme Court of the United States

NORMAN C. BERNHARDT,

Petitioner,

v.

POLYGRAPHIC COMPANY OF AMERICA, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MANFRED W. EHRICH, JR.,
EUGENE V. CLARK,
100 South Street,
Bennington, Vermont,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. ------

NORMAN C. BERNHARDT

Petitioner,

v.

POLYGRAPHIC COMPANY OF AMERICA, INC.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The opinion of the district court has not yet been reported. It is set forth in the appendix, *infra* page 1 A. The opinion of the circuit court of appeals has not yet been reported. It is set forth in the appendix, *infra* page 5 A.

Jurisdiction

The mandate reversing the order of the district court with costs to the appellant was entered February 4, 1955. On March 11, 1955, on motion of the petitioner, the mandate was recalled by the circuit court and arbitration proceedings were stayed pending petitioner's application to the Supreme Court for certiorari.

The jurisdiction of this court is invoked under 28 U. S. C. 1254.

Questions Presented

1. Whether or not Section 3 of the Federal Arbitration Act (Title 9, United States Code), which provides for a stay of the trial of an action pending arbitration, may be invoked to enforce arbitration of questions arising out of a contract of employment calling for performance solely within Vermont, a non-enforcing state, where the case has been removed from a Vermont state court to the federal district court solely upon the diversity of citizenship of the parties.

2. Whether or not the doctrine of the case of *Erie RR. Co.* v. *Harry J. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188 (1938), required the federal court in this situation to apply local Vermont law which denies the enforceability of arbitration agreements.

Statutes Involved

This case involves the consideration of Sections 1, 2 and 3 of Title 9 of the United States Code, known as the UNITED STATES ARBITRATION ACT OF JULY 30, 1947, C. 392 Sec. 1, 61 Stat. 669, which are set forth in the appendix, *infra* page 11 A.

Statement of the Case

The case at bar involves the breach of a contract of employment dated July 19, 1952, whereby the respondent engaged the petitioner to be superintendent at its plant in North Bennington, Vermont, for a term of three years and subsequently discharged him, without cause, as he claims, on October 22, 1953, when the contract had nearly two years to run.

The contract contained an arbitration clause which read as follows:

> "*Eleventh:* The parties hereto do agree that any difference, claim or matter in dispute arising between

them out of this agreement or connected herewith shall be submitted by them for arbitration by the American Arbitration Association, or its successor, and that the determination of said American Arbitration Association or it's successor, or of any arbitrators designated by said Association, on such matter shall be final and absolute. The said arbitrator shall be governed by the duly promulgated rules and regulations of the American Arbitration Association, or its successor, and the pertinent provisions of the Civil Practice Act of the State of New York relating to arbitrations. The decision of the arbitrator may be entered as a judgment in any court of the State of New York or elsewhere."

After his discharge, petitioner brought suit in Vermont and the case was removed from the Bennington County Court to the United States District Court for the District of Vermont by respondent's petition alleging diversity of citizenship of the parties as the sole ground for jurisdiction of the federal court.

After removal to the district court, the respondent sought by motion to have the legal proceedings stayed pending arbitration, relying on Section 3 of the Federal Arbitration Act (Title 9 of the United States Code).

The motion was denied by the District Court for the District of Vermont, which under the doctrine of *Erie RR. Co.* v. *Harry J. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188 (1938), applied the Vermont Law which denies enforceability of arbitration agreements (App. page 7 A).

Respondent then appealed to the United States Circuit Court of Appeals for the Second Circuit where the district court's decision was reversed and a mandate issued staying proceedings under the authority of Section 3 of the Federal Arbitration Act (9 U. S. Code, Sec. 3), the circuit court holding that this case does not fall within the doctrine of *Erie* v. *Tompkins, supra* (App. page 9 A).

On motion of the petitioner the mandate was recalled by the circuit court and arbitration proceedings were stayed pending petitioner's application to the Supreme Court for certiorari.

Reasons for Granting the Writ

1. *The decision of the circuit court of appeals in the case at bar conflicts with decisions in other circuit courts of appeals.*

a) In *Gatliff Coal Co.* v. *Cox*, 142 F. 2d. 876 (1944), the 6th Circuit Court of Appeals held in a diversity case that the question of the enforceability of arbitration agreements is governed not by Section 3 of the UNITED STATES ARBITRATION ACT but by law of the state of the forum, namely Kentucky, which does not recognize the enforceability of arbitration agreements.

b) In *Tejas Development Co.* v. *McGough Bros.*, 165 F. 2d. 276 (1947), the 5th Circuit, in a diversity case, held that the Federal Arbitration Act did not govern the case, and applied the local law of Texas, a non-enforcing state, in holding invalid an award of arbitrators made after one of the parties had refused to take part in the arbitration proceedings.

2. *The decision in the case at bar in the circuit court is in direct conflict with the law and policy of the State of Vermont, and of all other nonenforcing jurisdictions.*

In the case at bar the jurisdiction of the federal courts is grounded solely on diversity, and "The essence of diversity jurisdiction is that a federal court enforces State law and State policy", *Angel* v. *Bullington*, 330 U. S. 183, 191, 91 L. Ed. 832, 838 (1947).

Under Vermont law an agreement to arbitrate is revocable at any time before an award is actually made by the arbitrators. *Mead's Administratrix* v. *Owen*, 83 Vt. 132, 135 (1910); *Sartwell* v. *Sowles et al*, 72 Vt. 270 (1900).

In Vermont the course of litigation is not "tortuous" as it is in New York and is in fact more economical than arbitration, and the policy of the state is to guaranty to its litigants the right to a trial under established judicial rules and before a jury. Some twelve states including New York and Pennsylvania have arbitration acts similar to the Federal Arbitration Act (see Kochery, *The Enforcement of Arbitration Agreements in the Federal Courts: Erie* v. *Tompkins*, 39 Cornell Law Quarterly 74, (note 7 at page 76). However, a majority of States, including Vermont, have not found it necessary to provide this non-judicial mode of settling disputes so as to relieve the courts of pressure of business.

The decision of the circuit court would deprive an unwilling party of the right to a trial of this action by a court and jury, as otherwise guaranteed him by Vermont Law, merely because of the accident of the diversity of citizenship of the parties.

3. *The circuit court in the case at bar has decided a federal question in a way that conflicts with applicable decisions in this court.*

a) The circuit court decided that "a stay pursuant to Section 3 of the Federal Arbitration Act, 9 U. S. C. Sec. 3, is not 'substantive' within the meaning of *Erie RR. Co.* v. *Tompkins*, 304 U. S. 64, and *Guaranty Trust Company* v. *York*, 326 U. S. 99."

Yet, in *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 89 L. Ed. 2079 (1945), this court held that

> "In essence, the intent of that (*Erie* v. *Tompkins*) decision was to insure that, in all cases where a Federal Court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the Federal Court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State Court. The nub of the policy that underlies *Erie RR. Co.* v. *Tompkins* is that for the same trans-

> action the accident of a suit by a nonresident litigant in a Federal Court instead of in a State Court a block away should not lead to a substantially different result. * * *" (page 111)

and in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 555, 93 L. Ed. 1528, 1541 (1949) this court held that

> "But *Erie RR. Co.* v. *Tompkins* and its progeny have wrought a more far-reaching change in the relation of state and federal courts and the application of state law in the latter whereby in diversity cases the federal court administers the state system of law in all except details relating to its own conduct of business."

In *Woods* v. *Interstate Realty Co.*, 337 U. S. 535, 538, 93 L. Ed. 1524, 1527, this court held as in *Guaranty Trust Co.* v. *York*, *supra* that in diversity cases the federal court sits merely as another court of the state (citing *Erie* v. *Tompkins* and *Angel* v. *Bullington*, *supra*) and that

> "the York case was premised on the theory that a right which local law creates but which it does not supply with a remedy is no right at all for purposes of enforcement in a federal court in a diversity case".

See also *Angel* v. *Bullington*, quoted *supra*, and *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530, 93 L. Ed. 1520 (1949).

b) The circuit court in the case at bar relies heavily on the statement in *Murray Oil Co.* v. *Mitsui & Co.*, 146 F. 2d. 381, 383, (CCA 2, 1944) that

> "Arbitration is merely a form of trial, to be adopted in the action itself, * * *". (App. page 9 A)

This, it will be noted, is the very argument put forward by the unsuccessful respondent in this court in *Wilko* v. *Swan*, 346 U. S. 427, 98 L. Ed. 114 (1953).

Wilko v. *Swan* (*supra*) on a careful analysis is very similar to the case at bar; the U. S. Supreme Court held that

an arbitration clause in a margin agreement was unenforceable because the Securities Act, Sec. 14, declared void any condition, stipulation or provision binding a buyer to waive, among other things, a trial in the State or Federal Courts of any right he might have to recover against a seller, reasoning that:

> "As their award may be made without explanation of their reasons and without a complete record of their proceedings the arbitrators' conception of the legal meaning of such statutory requirements as 'burden of proof', 'reasonable care' or 'material fact' * * * cannot be examined. Power to vacate an award (under the Federal Arbitration Act, Sec. 10) is limited.
>
> "* * * In unrestricted submissions, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation." (pages 436-437)

4. *The court of appeals has decided an important question of federal law which has not been but should be settled by this court.*

a) The case of *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 70 F. 2d. 297 (CCA 2, 1934) Aff'd 293 U. S. 449, (1935) cited in paragraph 2 of the opinion of the circuit court of appeals (App. page 9 A) in this case, is the leading case supposed to support the proposition that Section 3 of the Federal Arbitration Act is not limited in its application to contracts involving maritime transactions or interstate or foreign commerce.

The *Shanferoke Case* was decided before *Erie* v. *Tompkins* had overruled the venerable case of *Swift* v. *Tyson*, 16 Pet. 1, 10 L. Ed. 865 (1842).

It should be noted that the statements of the Circuit court in the *Shanferoke* case were dicta as to the ap-

plicability of Section 3, for it specifically points out that "It is not necessary, however, to decide the point here, because the contract involved commerce as defined in Section 1" (page 299).

Shanferoke v. *Westchester* may have been good law when it was decided, but if the circuit court or the Supreme Court intended to say, as we do not concede they did, that in diversity cases only the Federal Rule of remedy should be applied to the exclusion of conflicting local state rules, it seems clear that any such holding was overruled in *Erie* v. *Tompkins*, *supra*, three years later. It is petitioner's contention that in the light of the *Erie* v. *Tompkins* decision the Federal Arbitration Act is necessarily limited in its application to cases involving Federal jurisdiction based on grounds other than diversity of citizenship. *Tejas* v. *McGough*, *supra*, so holds and is the only case in the circuit courts on this question which specifically mentions the *Erie* case.

b) In the three remaining cases relied upon by Judge Frank in his opinion in the circuit court below, (App. page 9 A) jurisdiction of the federal court was based on grounds other than diversity of citizenship of the parties:

Murray Oil Products Company v. *Mitsui & Company*, 146 F. 2d. 381 (CCA 2, 1944) involved a transaction in foreign commerce resulting in an action begun in a court of the State of New York. It should be noted that New York is a state which enforces arbitration agreements; consequently there was no conflict between Federal and local law.

Agostini Bros. Bldg. Corp. v. *United States*, 142 F. 2d. 854 (CCA 4, 1944) involved an action under the Miller Act relating to public building contracts.

In *Parry* v. *Bache*, 125 F. 2d. 493 (CCA 5, 1942), the court stated that because the case clearly involved interstate commerce it was unnecessary to decide whether the "stay" section (s.3) of the act is broader than the preceding sections.

It is submitted that none of these cases is authority for Judge Frank's proposition "that a stay, pursuant to Section 3 . . . is not 'substantive' within the meaning of *Erie RR. Co.* v. *Tompkins* . . .," and indeed, none of them mention the *Erie* case.

c) The questions petitioner seeks to have reviewed here have been made the subject of two recent law review articles, both of which recognize that the questions have not yet been settled by this court: *The Enforcement of Arbitration Agreements in the Federal Courts: Erie* v. *Tompkins* by David R. Kochery, 39 Cornell Law Quarterly 74. Cf. Sturges and Murphy; *Some Confusing Matters Relating to Arbitration under the United States Arbitration Act*, 17 Law and Contemporary Problems 580, 590.

Conclusion

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

MANFRED W. EHRICH, JR.
EUGENE V. CLARK
100 South Street,
Bennington, Vermont
Counsel for Petitioner

Opinion.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

CIVIL ACTION NO. 1599.

NORMAN C. BERNHARDT

v.

POLYGRAPHIC COMPANY OF AMERICA, INC.

GIBSON, J.

On February 15, 1954, the plaintiff, a citizen of Vermont, instituted this civil action for breach of an employment contract in the county court within and for the County of Bennington, Vermont. On March 5, 1954, the defendant, a corporate citizen of New York, petitioned for the removal of the county court action to this court under the provisions of 28 U. S. C. A. 1441 et seq. On March 10, 1954, the defendant filed its answer to the complaint, joining therewith a counterclaim against the defendant.

On May 6, 1954, the defendant moved for a stay of the proceedings in this court on the grounds that the employment contract here in issue contained a mandatory, irrevocable agreement providing for arbitration of any disputes which might arise out of the contract. The particular contractual provisions pertinent here are as follows:

> "ELEVENTH: The parties hereto do agree that any differences, claim or matter in dispute arising between them out of this agreement or connected herewith shall be submitted by them to arbitration by the American Arbitration Association, or its successor and that the determination of said American

Arbitration Association or its successors, or of any arbitrators designated by said Association, on such matter shall be final and absolute. The said arbitrator shall be governed by the duly promulgated rules and regulations of the American Arbitration Association, or its successor, and the pertinent provisions of the Civil Practice Act of the State of New York relating to arbitrations. The decision of the arbitrator may be entered as a judgment in any court of the State of New York or elsewhere."

"FOURTEENTH: The parties hereto do hereby stipulate and agree that it is their intention and covenant that this agreement and performance hereunder and all suits and special proceedings hereunder be construed in accordance with and under and pursuant to the laws of the State of New York and that in any action, special proceeding or other proceeding that may be brought arising out of, in connection with or by reason of this agreement, the laws of the State of New York shall be applicable and shall govern to the exclusion of the law of any other forum, without regard to the jurisdiction in which any action or special proceeding may be instituted."

It is the defendant's contention that it is entitled to the stay it seeks on three independent grounds:

1. Under the authority of the Federal Arbitration Act, so-called, as set forth in 9 U. S. C. A.;

2. That the parties have validly contracted to adjust contractual disputes by arbitration;

3. That a Vermont court would, under like circumstances, stay the present action.

The cause was argued at Brattleboro, Vermont, on June 22, 1954, at which time the plaintiff petitioned for a temporary injunction to prevent the defendant from continuing the arbitration proceedings which it had instituted on or about May 3, 1954.

CONCLUSION OF LAW

It might well be said that all three of the defendant's contentions are centered in one issue, i.e.: what would a state court of this jurisdiction do were the instant motion before it? Passing over the questions of whether this employment contract is a contract evidencing a transaction involving commerce or if this is a suit or proceeding brought in a District Court of the United States, we must remember that a United States District Court is bound by the substantive law of the state within the boundaries of which it sits. *Erie RR. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188. In a case based solely on diversity of citizenship, the substantial result of litigation in a Federal Court should not differ from that in a state court. *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079; *Angel* v. *Bullington*, 330 U. S. 183, 67 S. Ct. 650, 91 L. Ed. 832. It is therefore obvious that this Court must act upon the stay motion so as to reach the same legal result as would a state court of this jurisdiction.

There is no statutory law governing arbitration in Vermont; common law rules must, therefore, necessarily apply. The common law rule is that an agreement to submit an issue to arbitration is not binding and is revocable at any time before an award is actually made by arbitrators. *Mead's Admx.* v. *Owen*, 83 Vt. 132, 135; *Sartwell* v. *Soules, et al.*, 72 Vt. 270, 277. This seems also to be the general rule to be applied in the absence of a controlling statute. *Shafer* v. *Metro-Goldwyn-Mayer Dist. Corp.*, 36 Ohio App. 31, 172 N. E. 689, 693; 6 C. J. S. Arbitration and Award 33(a).

In accordance with the law of Vermont, it is ordered that the defendant's motion for a stay of these proceedings be denied. The temporary injunction sought by the plaintiff is a matter addressed largely to the discretion of this Court. *Meccano, Ltd.* v. *John Wanamaker*, 253 U. S. 136, 40 S. Ct.

463, 64 L. Ed. 822. The requisite need for this injunction has not been shown convincingly and the petition therefor is denied. *National Commodities Co.* v. *Viret*, C. C. A. 2, 296 F. 664.

Let entry be made accordingly.

ERNEST W. GIBSON
Ernest W. Gibson
U. S. District Judge

Dated at Brattleboro, Vermont, this eighth day of July, 1954.

Endorsed: Filed July 9, 1954,

ARNOLD A. MURRAY
Deputy Clerk.

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 114 October Term, 1954

Argued December 14, 15, 1954

Decided January 19, 1955

Docket No. 23196

NORMAN C. BERNHARDT,

Appellee,

v.

POLYGRAPHIC COMPANY OF AMERICA, INC.,

Appellant.

Before: Swan, Frank and Hincks, Circuit Judges.

Appeal from an order of the United States District Court for the District of Vermont, entered by Judge Gibson. Reversed.

MANFRED W. EHRICH, JR. and EUGENE V. CLARK, Bennington, Vermont, for appellee;

MCNAMARA & LARROW, GUY M. PAGE and GUY M. PAGE, JR., Burlington, Vermont, for appellant.

Defendant, a New York corporation, made a written agreement in New York with plaintiff, then a resident of that State. The agreement provided for the employment of plaintiff as the superintendent of defendant's lithograph plant in Vermont. It also provided:

> "Subject to the general supervision and pursuant to the orders, advice and direction of the Employer,

Employee shall have charge of and be responsible for the operation of said lithographic plant in North Bennington, shall perform such other duties as are customarily performed by one holding such position in other, same or similar businesses or enterprises as that engaged in by the Employer, and shall also additionally render such other and unrelated services and duties as may be assigned to him from time to time by Employer. . . .

"Employer shall pay Employee and Employee agrees to accept from Employer, in full payment for Employee's services hereunder, compensation at the rate of $15,000.00 per annum, payable twice a month on the 15th and 1st days of each month during which this agreement shall be in force; the compensation for the period commencing August 1, 1952 through August 15, 1952 shall be payable on August 15, 1952. In addition to the foregoing, Employer agrees that it will reimburse Employee for any and all necessary, customary and usual expenses incurred by him while traveling for and on behalf of the Employer pursuant to Employer's direction. . . .

"It is expressly understood and agreed that Employee shall not be entitled to any additional compensation by reason of any service which he may perform as a member of any managing committee of Employer, or in the event that he shall at any time be elected an officer or director of Employer. . . .

"The parties hereto do agree that any differences, claim or matter in dispute arising between them out of this agreement or connected herewith shall be submitted by them to arbitration by the American Arbitration Association, or its successor and that the determination of said American Arbitration Association or its successors, or of any arbitrators designated by said Association, on such matter shall be final and absolute. The said arbitrator shall be governed by the duly promulgated rules and regulations of the American Arbitration Association, or its successor, and the pertinent provisions of the Civil Practice Act of the State of New York relating to

arbitrations. The decision of the arbitrator may be entered as a judgment in any court of the State of New York or elsewhere. . . .

"The parties hereto do hereby stipulate and agree that it is their intention and covenant that this agreement and performance hereunder and all suits and special proceedings hereunder be construed in accordance with and under and pursuant to the laws of the State of New York and that in any action, special proceeding or other proceeding that may be brought arising out of, in connection with or by reason of this agreement, the laws of the State of New York shall be applicable and shall govern to the exclusion of the law of any other forum, without regard to the jurisdiction in which any action or special proceeding may be instituted."

Plaintiff, having become a resident of Vermont, brought this action in the Vermont state court. His complaint set forth the agreement, alleged that defendant had wrongfully discharged plaintiff, and asked damages. Defendant, having removed the suit to the court below, filed its answer, including a counterclaim. Defendant then made a motion for a stay; it alleged that it had served on plaintiff a demand for arbitration, and prayed that plaintiff's suit be stayed "pending appointment of arbitrators and determination by such arbitrators of the controversies which are the subject matter of this action."

The district judge denied the stay on the ground that, under Vermont "law," an agreement to arbitrate "is not binding and is revocable at any time before an award is actually made by arbitrators," and that, under *Erie RR. Co. v. Tompkins*, 304 U. S. 64, and related cases, Vermont "law" controlled. Defendant appealed.

The Federal Arbitration Act, 9 U. S. C. Secs. 1, 2 and 3, reads as follows:

"Sec. 1. *Maritime transactions* and *commerce* defined; exceptions to operation of title:

> "'Maritime transactions,' as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; 'commerce,' as herein defined, means commerce among the several States or with foreign nations; or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or foreign nation, but nothing herein contained shall apply to contracts of employment in of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

"Sec. 2. Validity, Irrevocability, and enforcement of agreements to arbitrate.

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

"Sec. 3. Stay of proceedings where issue therein referable to arbitration.

> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one

of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

FRANK, Circuit Judge:

1. We think that a stay, pursuant to Section 3 of the Federal Arbitration Act, 9 U. S. C. Sec. 3, is not "substantive" within the meaning of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, and *Guaranty Trust Company* v. *York*, 326 U. S. 99. We so held, per Judge Learned Hand, in *Murray Oil Products Company* v. *Mitsui & Company*, 146 F. (2d) 381, 383 (C. A. 2), where we said: "Arbitration is merely a form of trial, to be adopted in the action itself, in place of a trial at common law: it is like a reference to a master, or an 'advisory trial' under Federal Rules of Civil Procedure, Rule 39(c):"

2. Section 3 applies whether or not the agreement is of a kind covered by Sec. 2, i.e., for purposes of Sec. 3, the agreement need not involve a maritime transaction or interstate or foreign commerce. The power to enact Sec. 3 derives from Article III, Section 2 of the Constitution. See, e.g., *Skanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 70 F. (2d) 297, 298 (C. A. 2) aff'd. 293 U. S. 449; *Agostini Bros. Bldg. Corp.* v. *United States*, 142 F. (2d) 854 (C. A. 4).

3. Plaintiff argues that Section 3 deals with a suit "brought in any court of the United States" and therefore not with a removed suit. We cannot agree. *Murray Oil Products Co.* v. *Mitsui & Co.*, *supra*, was a removed suit; see also *Parry* v. *Bache*, 125 F. (2d) 493, 495 (C. A. 5).

4. Section 1 of the Act provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees or any other class of workers engaged

in foreign or interstate commerce."[1] We need not in this case decide whether this clause is restricted in its application to those sections of the Act relating to interstate and foreign commerce or whether it applies to all sections, including Section 3. For assuming, arguendo, that the second interpretation is correct, we think the clause irrelevant here. The words "any other class of workers," read in connection with the immediately preceding words, show an intention to exclude contracts of employment of a "class" of "workers" like "seamen" or "railroad employees."[2] Plaintiff was not hired as a "worker" but as a plant superintendent, at a salary of $15,000 a year, with managerial duties fundamentally different from those of "workers."[3]

The California arbitration statute excludes from its scope "contracts pertaining to labor." The California

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[1] For a variety of conclusions as to the meaning and application of this clause, see, e.g., *Donahue* v. *Susquehanna Collieries Co.*, 138 F. (2d) 3 (C. A. 3); *Watkins* v. *Hudson Coal Co.*, 151 F. (2d) 311 (C. A. 3); *Amalgamated Association* v. *Greyhound Lines*, 192 F. (2d) 310 (C. A. 3); *Pennsylvania Greyhound Lines* v. *Amalgamated Association*, 193 F. (2d) 327 (C. A. 3); *Tenney Engineering Co.* v. *United Electrical R. & M. Workers*, 207 F. (2d) 450 (C. A. 3); *Shirley-Herman Co., Inc.* v. *International Hod-Carriers*, 182 F. (2d) 806, 809 (C. A. 2); *Agostini Bros. Building Corp.* v. *United States*, 142 F. (2d) 854 (C. A. 4); *International Union* v. *Colonial Hardware Flooring Co.*, 168 F. (2d) 33 (C. A. 4); *Gatliff Coal Co.* v. *Cox*, 142 F. (2d) 876 (C. A. 6); *Lewittes & Sons* v. *United Furniture Workers*, 95 F. Supp. 851 (D. C., S. D. N. Y.); *Ludlow Mfg. & Sales Co.* v. *Textile Workers Union*, 108 F. Supp. 45 (D. C. Del.).

[2] See discussion of the background of this clause in *Tenney Engineering Co.* v. *United Electrical R. & M. Workers*, 207 F. (2d) 450, 452-453 (C. A. 3).

[3] Note, inter alia, the provision contemplating that plaintiff might perform services "as a member of the management committee" and might be "elected an officer or director."

courts have held that this exclusion does not cover a contract with a sales manager, hired at a salary of $100 per week; *Kerr* v. *Nelson*, 59 Pac. (2d) 821; or one with a motion-picture actor to be paid $1,000 per week; *Universal Pictures Corp.* v. *Superior Court*, 50 Pac. (2d) 500. See also *Levy* v. *Superior Court*, 164 Pac. (2d) 770, 773. We think these decisions most persuasive.

Reversed.

Statutes

UNITED STATES ARBITRATION ACT OF FEBRUARY 12, 1925, C. 213, Secs. 1, 2, & 3, 43 Stat. 883 as amended by UNITED STATES ARBITRATION ACT OF JULY 30, 1947, C. 392, Sec. 1, 61 Stat. 669.

"Sec 1. *Maritime transactions* and *commerce* defined; exceptions to operation of title:

> "'Maritime transactions,' as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; 'commerce,' as herein defined, means commerce among the several States or with foreign nations; or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or foreign nation, but nothing herein contained shall apply to contracts of employment in of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

"Sec. 2. Validity, Irrevocability, and enforcement of agreements to arbitrate.

"A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

"Sec. 3. Stay of proceedings where issue therein referable to arbitration.

"If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."